No. 83-1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

REPROSYSTEM, B.V., and N. NORMAN MULLER,

Petitioners,

v.

SCM CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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July 1, 1984

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Counterstatement Of The Question Presented

Should the implied right of action which has been recognized under Section 10(b) and Rule 10b-5 be expanded to apply to negotiations for the purchase and sale of securities where those negotiations do not result in a contract of purchase and sale and no securities are purchased or sold?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent SCM Corporation ("SCM")[1] respectfully requests that this Court deny the petition for a writ of certiorari seeking to review the judgment of the United States Court of Appeals for the Second Circuit entered on February 2, 1984.

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1 Pursuant to Rule 28.1 of this Court, SCM states that it has no parent or affiliates; its subsidiaries (other than wholly-owned subsidiaries) are: Pinturas Ecuatorias, S.A., Distribuidora Americana, C.A., Pinturas Centro-Americanas, S.A., Glidden de Honduras, S.A., Galvanizadora Centro-Americana, S.A., Compania Agricola Myristica, S.A., and Pinturas Centro-Americanas Costa Rica, Ltda. (all subsidiaries of SCM-Glidden International Co.).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 727 F.2d 257 (2d Cir. 1984) and is reprinted in the Appendix filed by petitioners at 1a-16a.[2] The opinion of the District Court for the Southern District of New York, reported at 522 F. Supp. 1257 (S.D.N.Y. 1981), is reprinted in the Appendix at 17a-68a.[3]

STATUTE AND REGULATION INVOLVED

The statute and regulation which petitioners claim are involved are Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982) ("Section 10(b)") and Rule 10b-5, 17 CFR § 240.10b-5 (1983) ("Rule 10b-5"), promulgated thereunder by the Securities and Exchange Commission.[4]

STATEMENT OF THE CASE

Between May 1976 and early February 1977, SCM and N. Norman Muller ("Muller") engaged in negotiations for the purchase of SCM's European copier businesses by Reprosystem, B.V. ("Reprosystem"), a Netherlands Antilles corporation to be formed by Muller. After SCM withdrew from the negotiations in February 1977, Muller and Reprosystem brought an action against SCM seeking money damages.

Muller and Reprosystem alleged that a contract of purchase and sale was reached in December 1976 and that SCM breached that contract by refusing to sell the businesses.

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2 References in the form "Appendix ____" refer to pages of the Appendix filed by petitioners.

3 The Appendix also contains four opinions of the district court relating to the calculation of damages. (Appendix at 69a-89a.) None of those opinions have any bearing upon the purported federal securities law claim alleged here.

4 Section 10(b) and Rule 10b-5 are reprinted in the Appendix at 92a-93a.

Additional state law claims were pleaded based upon allegations of promissory estoppel, unjust enrichment, a failure to perform and negotiate in good faith, and common law fraud. To support federal jurisdiction, petitioners also included a claim for purported securities fraud under Section 10(b) and Rule 10b-5.

In its initial opinion, dealing primarily with liability (522 F. Supp. 1257), the district court quickly disposed of petitioners' federal and common law fraud claims, finding that SCM's conduct and its refusal to sign the contract drafts were "motivated not by an intent to defraud or deceive, but simply out of careful financial analysis not rising to the level of fraud under the securities laws or common law." (522 F. Supp. at 1273).[5]

The district court then turned to the heart of the case as it had been presented at trial—whether Muller and Reprosystem were entitled to recover damages on their breach of contract claim. SCM argued: (i) that a binding agreement was never reached; (ii) that the parties moreover had in fact agreed not to be bound to performance absent the execution of a written contract, and it was undisputed that no contract had been signed; and finally, (iii) that petitioners were unable to perform the "contract" which they claimed had been formed by the December drafts.

The district court concluded that the incomplete and unexecuted December drafts constituted enforceable contracts for the purchase and sale of SCM's copier operations (522 F. Supp. at 1271), but found also that Muller and Reprosystem were financially unable to perform on their part. (*Id.* at 1273, 1279 and 1281.) Despite this finding that petitioners could not perform whatever "contract" may have existed, and despite its additional finding that petitioners' inability to perform pre-

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5 The district court also rejected the securities fraud claim on the basis of the "sale of business doctrine." (522 F. Supp. at 1273-74.) On the other hand, the Second Circuit upheld the dismissal of the securities fraud action but took pains to point out that it did not rely upon the sale of business doctrine as a ground for its affirmance. (727 F.2d at 265.)

cluded any award of contract damages under applicable state law (522 F. Supp. at 1280-1281), the district court nonetheless held that SCM's breach of wholly undefined "duties and obligations perhaps not previously perceived or articulated as such" (*id.* at 1273) entitled Muller and Reprosystem to relief and awarded damages in "light of the doctrine of restitution or unjust enrichment". (*Id.* at 1281.)

Applying New York law, the Second Circuit reversed the district court's determination that a contract of purchase and sale had been formed.

> In this case the trial judge determined that the parties intended to be bound by the unexecuted "final drafts" and did not intend their contractual obligation to be contingent upon their final signed contracts. (727 F.2d at 260.)
>
> * * *
>
> Our review of the entire record leaves us with the definite and firm conviction that a mistake was made by the district court . . . The uncontested evidence clearly establishes the parties' intent not to be bound prior to execution of formal contracts . . . (727 F.2d at 261-262.)
>
> * * *
>
> Since the parties intended not to be bound prior to execution of those written documents and since no contract was ever executed, no written contract came into existence . . . Our conclusion that no contract existed eliminates the only basis on which [the District Court] awarded damages to [petitioners]. (727 F.2d at 263.)[6]

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6 The Second Circuit also rejected the argument that the damage award could be sustained on the theory of unjust enrichment since Muller and Reprosystem made no investment, assumed no risk, and conferred no benefit upon SCM. There was nothing "unjust about SCM retaining profits from SCM's businesses run by SCM's management at SCM's expense." (727 F.2d at 264.)

Having concluded that SCM had not entered into a contract of purchase and sale, the Second Circuit went on to hold that the "purchase or sale" requirement of *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952), therefore had not been satisfied, and affirmed the district court's dismissal of petitioners' 10b-5 claim.[7] (727 F.2d at 265.)

REASONS FOR DENYING THE WRIT

I.

NO LAW OR POLICY SUPPORTS PETITIONERS' UNIQUE CONTENTION THAT APPLICATION OF SECTION 10(b) AND RULE 10b-5 SHOULD BE EXPANDED TO REACH UNSUCCESSFUL NEGOTIATIONS FOR THE PURCHASE AND SALE OF SECURITIES

A private damage action under Section 10(b) and Rule 10b-5 is limited to those who are actual purchasers or sellers of securities. *Birnbaum v. Newport Steel Corp., supra; Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). Because, as the Second Circuit found, plaintiffs "were not and do not claim to be actual purchasers or sellers of SCM stock" (727 F.2d at 265), the *Birnbaum* rule bars Muller and Reprosystem from maintaining an action under Section 10(b) and Rule 10b-5.[8] And, even assuming this Court were to determine that Section 10(b) and Rule 10b-5 apply to contracts for the purchase or sale of large blocks or all of the stock of a closely held corporation, petitioners "fall outside even that enlarged class of persons" (727 F.2d at 265) because of the conceded absence of a contract to purchase or sell anything.

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7 The Court of Appeals also affirmed the district court's dismissal of petitioners' other state law claims including their claim of common law fraud. (727 F.2d at 265.)

8 In their petition, plaintiffs make no statement to rebut this determination.

Muller and Reprosystem ask this Court to ignore *Birnbaum* and to create a new and troublesome implied federal cause of action by extending the scope of Section 10(b) and Rule 10b-5 to negotiations for the purchase and sale of stock even when no contract is formed and no stock sold. Petitioners say that the creation of this new federal claim is supported by "the logic of *Blue Chip Stamps*". (Petition, p. 15).

Nothing in *Blue Chip Stamps* supports the petitioners' contention that "Rule 10b-5 should apply to face-to-face negotiations for the purchase of a security regardless of whether a contract is formed." (Petition, p. 17.) In *Blue Chip Stamps,* this Court stated that "*Birnbaum* was rightly decided" (421 U.S. at 731) and explicitly held that a private damage action under Rule 10b-5 is confined to actual purchasers and sellers of securities.

Nor is it necessary or desirable to expand the application of Section 10(b) and Rule 10b-5 "to ensure the integrity of the negotiation process." More than adequate protection against improper conduct during a contract negotiation is provided by the multiple remedies available under state law. What this Court noted in *Blue Chip Stamps* is applicable here:

> "[I]n *Birnbaum* itself, while the plaintiffs found themselves without federal remedies, the conduct alleged as the gravamen of the federal complaint later provided the basis for recovery [under] state law." (421 U.S. 739 n. 9).

The petition should be denied for these reasons alone.

II.

NO ISSUE OF RECURRING IMPORTANCE HAS BEEN PRESENTED

The petition raises no issue of recurring or sufficient importance such as to warrant consideration by this Court. Petitioners present no support for their essential proposition that this case raises "a recurring issue of considerable importance to the integrity of negotiations for stock sales." (Petition, p. 19.) They cite no case, and we have found none, in which any other litigant has discerned a federal securities law claim based on negotiations which do not result in an agreement of purchase and sale. Nor do they demonstrate a need for more federal remedies in addition to the multiple state law remedies, including breach of contract, promissory estoppel, unjust enrichment and bad faith dealing, which are more than adequate and which were pleaded as pendent claims in this case. Nor has there been any inkling from Congress, the SEC, or the courts that the federal securities laws should be expanded to apply to unsuccessful negotiations. In short, this is simply another case in which a litigant seeks access to a federal court on an attenuated and contrived federal claim when, in fact, the matters in dispute arise out of, and eventually are tried and decided upon, state common law theories of liability.

CONCLUSION

The petition for a writ of certiorari should be denied. Additionally, because the question presented by petitioners is fallacious and because the petition is frivolous, respondent asks that it be awarded double its costs and reasonable attorneys' fees incurred in opposing the petition. Supreme Court Rule 57.7; *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 766 (1980); *cf.* Federal Rules of Civil Procedure, Rule 11.

Respectfully submitted,

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